

***United States Court of Appeals
for the Second Circuit***



APPENDIX

Docket Nos.

77-2074 & 77-4136

UNITED STATES COURT OF APPEALS

FOR THE
SECOND CIRCUIT

B
7/5

-----X
DER-RONG CHUR,

Petitioner-Appellant.

- v -

BENEDICT J. FERRO, et al.,

Respondents-Appellees.
-----X

APPENDIX



LAW OFFICES OF DAVID C. BUXBAIM, P.C.,
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PAGINATION AS IN ORIGINAL COPY

Index To Appendix

	<u>Page</u>
Docket Entries (77 Cv. 211, N.D.N.Y.)	A- 1
Index To Administrative Record	A- 2
Petition For Writ Of Habeas Corpus	A- 6
Affidavit In Support Of Petition	A-11
Opposition To A Writ Of Habeas Corpus	A-12
Supplementary Answer In Opposition To A Writ Of Habeas Corpus	A-16
Traverse	A-19
Verification	A-22
Motion To Reopen	A-23
Affidavit	A-25
Opposition To Motion To Reopen	A-31
Order To Show Cause (6/15/77, Port, D.J.)	A-34
Order Of Immigration Judge (6/27/77, SACKS, I.J.)	A-36
Order Denying Writ Of Habeas Corpus (6/29/77, Port, D.J.)	A-37
Decision and Order of EIA (7/14/77)	A-39
INS Order To Show Cause (7/18/74)	A-41
Transcript Of Deportation Hearing (9/4/74)	A-42
Second Version Transcript Of Deportation Hearing (9/4/77)	A-47
Transcript Of Hearing On Petition For Writ Of Habeas Corpus (before Port, D.J., 6/29/77)	A-51
Decision Of Immigration Judge (Order Of Deportation, 9/4/74)	A-93

DATE	NR.	PROCEEDINGS
June 10	1	Filed Petition for A Writ of Habeas Corpus & Affidavit in Support of Petition by Michael J. Kopcsak
June 10		Return of Application for Temporary Restraining Order-Judge Port grants the application for a show cause order and makes same returnable at Auburn on June 29, 1977 at 10:00 A.M.. The deportation of the petitioner is enjoined pending the outcome of the hearing. Petitioner is to submit order.
June 16	2	Filed Order to Show Cause of Judge Port (6/15/77), returnable June 29, 1977 at Auburn
June 29	3	Filed Government's Opposition to a Writ of Habeas Corpus
June 29	4	Filed Government's Supplemental Answer in Opposition to a Writ of Habeas Corpus
June 29	5	Filed Memorandum of Law in Support of Petition for Writ of Habeas Corpus
June 29	6	Filed Reply Affidavit in Support of Petition
June 29	7	Filed Traverse
June 29	8	Filed copy of Order of the Immigration Judge, Gordon W. Sacks
June 29	9	Filed Transcript of Hearing held Sept. 4, 1974 before Edward P. Emanuel
June 29	10	Filed Stipulation, re: Stay Order
June 29	11	Filed Order of Judge Port (6/29/77) that the Petition for Writ of Habeas Corpus is denied in all respects, that restriction on the removal of the petitioner from the Northern District of New York contained in said order to show cause be continued for a period of ten days, et al. and that the application for the release of the petitioner upon such conditions as the court deems proper, pending further proceedings and it is denied
June 29		TRIAL. Judge Port indicates that the Petition for a Writ of Habeas Corpus is denied and dismissed and that he shall file an order to that effect with the Clerk. Mr. Buxbaum moves for bail to be set for the petitioner-Motion denied. Judge Port continues the stay previously granted in this matter for ten days to allow the petitioner to seek other remedies
June 29	12	Filed Judgment
July 5		Mailed cards, re: Judgment to David C. Buxbaum, Esq. and Gustave J. DiBianco, Asst. U. S. Attorney
July 8	13	Filed Notice of Appeal by petitioner, Der-rong Chour & affidavit of service by mail

RSG:ee
7-3203

INDEX TO ADMINISTRATIVE RECORD

	<u>Pages</u>
1. Certification of documents, dated July 21, 1977	1
2. Transcript of hearing held before Honorable Edmund Port, United States District Judge for the Northern District of New York, on June 29, 1977	2-43
3. Decision of the Board of Immigration Appeals dated July 14, 1977 denying petitioners motion to reopen	44-45
4. Petitioner's memorandum in opposition to Government's request to dismiss the appeal dated July 11, 1977	46-53
5. Decision of the Board of Immigration Appeals dated July 6, 1977 denying the respondent's request for a stay of deportation,	54
6. Letter to Board of Immigration Appeals dated July 6, 1977 from the Acting District Director	55
7. Memorandum in connection with Government's request to dismiss the appeal, dated July 6, 1977	56-59
8. Letter to the Immigration and Naturalization Service dated June 30, 1977 from the United States attorney	60-63
9. Petition for a writ of habeas corpus, dated June 10, 1977	64-68
10. Affidavit in support of petition for writ of habeas corpus, dated June 10, 1977	69
11. Order to show cause, dated June 15, 1977	70-71

RSG:ee
7-3203

Pages

12.	Supplementary answer in opposition to a writ of habeas corpus, dated June 24, 1977	72-74
13.	Transcript of hearing held before Edward P. Emanuel, Immigration Judge, on September 4, 1974	75-78
14.	Copy of receipt	79
15.	Petitioner's traverse, dated June 28, 1977	80-82
16.	Petitioner's Verification, dated June 28, 1977	83
17.	Opposition to a writ of habeas corpus, dated June 20, 1977	84-87
18.	Order to show cause, notice of hearing, and warrant for arrest of alien, dated July 13, 1974	88
19.	Information card from petitioner's administrative file	89
20.	A portion of petitioner's Immigration bond	90
21.	Decision of Immigration Judge Emanuel dated September 4, 1974	91
22.	Warrant of Deportation, dated November 20, 1974	92
23.	Letter from the District Director, Immigration and Naturalization Service to petitioner, dated December 2, 1974	93
24.	Letter dated December 2, 1974 from District Director, Immigration and Naturalization Service to International Fidelity Insurance Co.	94

RSG:ee
7-3203

	<u>Pages</u>
25. Notice of Breach of Immigration bond, dated August 27, 1976	95
26. Immigration Service record of deportable alien	96
27. Letter dated June 15, 1977 from the Supervisory Deportation Officer to the Consulate General of the Republic of China at Taiwan	97
28. Petitioner's notice of appeal to the Board of Immigration Appeals, dated June 30, 1977	98-105
29. Letter from Special Inquiry Aide, Immigration and Naturalization Service, dated June 27, 1977 to Attorneys of Record	106
30. Transcript of hearing held before Immigration Judge Emanuel on September 4, 1974	107-111
31. Orders to show cause, notice of hearing, and warrant for arrest of alien, dated July 18, 1974	112-113
32. Order of Immigration Judge Gordon W. Sacks, dated June 27, 1977	114
33. Government's opposition to respondent's motion to reopen, dated June 27, 1977 . . .	115-117
34. Letter from Petitioner's Attorney dated June 16, 1977 to Immigration Judge Sacks	118
35. Petitioner's motion to reopen, dated June 16, 1977	119-120
36. Affidavit of Petitioner's Attorney, dated June 16, 1977	121-127

RSG:ee
7-3203

Pages

37. Transcript of hearing held before
Immigration Judge Emanuel on
September 4, 1974 128-132
38. Decision of Immigration Judge
Emanuel, dated September 4, 1974 133

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel.,
DER-RONG CHOUR,

Petitioner,

- against -

BENEDICT J. FERRO, District Director,
IMMIGRATION AND NATURALIZATION SERVICE, :
BUFFALO, NEW YORK, OR ANY OTHER PERSON :
HAVING THE SAID PETITIONER IN HIS CUSTODY;;
IMMIGRATION AND NATURALIZATION SERVICE,
Respondents. :

77 Civ. 211
PETITION FOR A WRIT
OF HABEAS CORPUS

TO THE HONORABLE JUDGES OF THE DISTRICT COURT
OF THE UNITED STATES, NORTHERN DISTRICT OF NEW YORK:

YOUR PETITIONER, DER-RONG CHOUR, by his attorneys, Law
Offices of David C. Buxbaum, P.C., for a writ of habeas corpus,
respectfully alleges, upon information and belief:

1. That petitioner is a citizen of the Republic of
China on Taiwan.
2. That petitioner arrived in the United States of
America on or about January or February, 1974.
3. That petitioner applied for and received Labor
Department certification as a mechanic.
4. That petitioner was, on one prior occasion, arrested
by the Immigration and Naturalization Service as a deportable alien,
and posted a \$2,500 bond and was thereafter released, pending
a hearing on the matter.
5. That petitioner was informed that he would receive
a notice of a hearing and the determination made thereat.
6. That petitioner was arrested on June 7, 1977 by the
Immigration and Naturalization Service within the Northern District
of New York.

7. That prior to his arrest on June 7, 1977, petitioner received no notification of any intended, pending, or past action of the Immigration and Naturalization Service of his case.

8. That petitioner, because of the aforesaid conduct of the Immigration and Naturalization Service, has been deprived of due process of law under the Fifth Amendment of the United States Constitution in that, among other things:

(a) The Immigration and Naturalization Service failed to give petitioner notice of the action taken in petitioner's case;

(b) The Immigration and Naturalization Service has failed to give notice to the petitioner in flagrant violation of applicable provisions of law and the provisions of its own rules and regulations. U.S. v. Nixon, 418 U.S. 683 (1974); Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363, 388 (1957); U.S., ex rel., Accardi v. Shaughnessy, 347 U.S. 260 (1954); Wasserstein v. Laird, 459 F. 2d 984 (2 Cir. 1972); Friedberg v. Resor, 453 F. 2d 935, 938 (2 Cir. 1971).

9. That petitioner is currently in the custody of Benedict J. Ferro, the respondent herein, within the Northern District of New York and is being held for the purpose of imminent deportation, under a final warrant of deportation.

10. That the interval between the notice to the petitioner of deportation and the time of the proposed deportation is too short to allow an examination of the records of the Immigration

and Naturalization Service, as petitioner was informed of the warrant of deportation on June 9, 1977, and its affirmance by the Board of Immigration Appeals on June 10, 1977 and the time of deportation is imminent. This interval was, it is respectfully submitted, obviously not long enough to apply for examination of the records.

11. That the petitioner has substantial equity in favor of his remaining in the United States, including the following, among others:

(a) As stated above in paragraph 3, petitioner has received a Department of Labor certification as a mechanic;

(b) Petitioner has property within the United States including an automobile (for which payment remains partially outstanding) and credit accounts;

(c) Petitioner is engaged to marry a permanent resident of the United States;

(d) There is currently legislation being proposed by the President of the United States of America and members of Congress to grant all aliens presently in the United States permanent resident status.

12. That the petitioner, after his arrest on June 7, 1977, was informed that he was being held subject to an Immigration and Naturalization Service order to show cause why he should not be deported, returnable on June 21, 1977, when a hearing was to be held.

13. That the petitioner retained as his attorneys, the undersigned, Law Offices of David C. Buxbaum, P.C., on June 9, 1977, at approximately 11:30 a.m.

14. That, initially, on June 9, 1977, his attorneys were informed by the I.N.S. at its Albany, New York office, that a hearing on the above-mentioned order to show cause would be held on June 21, 1977, and that, in the meantime, an application could be made for petitioner's release on bond pending a hearing.

15. That, at approximately 3:30 p.m. on June 9, 1977, petitioner's attorneys were informed by Mr. Rasmussen of the Albany, New York I.N.S. office that petitioner's deportation was imminent and that no hearing would be held.

16. That, later on June 9, 1977, petitioner's attorneys were informed by officials of the I.N.S. at its Albany, New York office that the order to show cause and hearing date thereon had been canceled by Joseph M. McSherry, the officer in charge of that office, and that petitioner was subject to imminent deportation.

17. That petitioner, by his attorneys, orally sought a stay of the warrant of deportation from Benedict J. Ferro, the District Director of the Immigration and Naturalization Service in Buffalo, New York. That stay was denied.

18. That the petitioner has orally appealed the afore-said denial of a stay to the Board of Immigration Appeals in Washington, D. C. and that the ~~appeal to that Board was denied on~~ ^{will not be able to} ~~act until next week,~~ ^{June 10, 1977} so that no stay is currently in effect, and petitioner's administrative remedies to obtain a stay have been exhausted.

19. That the action taken on behalf of the I.N.S. by Joseph M. McSherry in canceling the order to show cause and subjecting petitioner to immediate deportation was arbitrary, capricious, unreasonable and unlawful, and denied petitioner due process of law.

20. That petitioner, by his attorneys, is currently seeking to appeal the aforesaid cancellation of the order to show cause and the denial of a hearing on the issues of this case to the Board of Immigration Appeals in Washington, D. C., but may have insufficient time to do so before the warrant of deportation is executed, as there is currently no stay in effect.

21. That petitioner's attorneys were informed by officials of the I.N.S. that the reason for I.N.S.'s cancellation of the order to show cause and the immediate execution of the warrant of deportation is their belief that petitioner forfeited the bond he had posted upon his initial arrest. Petitioner, however, has informed his attorneys that he was never given notice of a hearing. Petitioner, it is respectfully submitted, is entitled to a hearing to determine whether or not he in fact forfeited bond. He is entitled also to a hearing on the issues whether or not he should be deported if it is found that he, because of defective notice on the part of the I.N.S., did not, in fact, forfeit his bond.

22. That petitioner respectfully requests this Court to grant this petition for a writ of habeas corpus, stay the warrant of deportation and release petitioner on such bond and on such conditions as the Court may determine to be reasonable under the circumstances of this case.

23. That no prior application has been made for the relief herein requested in this, or any other court.

WHEREFORE, it is respectfully prayed that the petition be granted in all respects, together with such other, further and different relief as to the Court may seem just and proper.

Dated: New York, New York
June 10, 1977

LAW OFFICES OF DAVID C. BUXBAUM, P.C.
Attorneys for Petitioner

By:

Michael J. Kopesak
Michael J. Kopesak

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel.,
DER-RONG CHOUR,

Petitioner,

- against -

BENEDICT J. FERRO, District Director,
IMMIGRATION AND NATURALIZATION SERVICE,
BUFFALO, NEW YORK, OR ANY OTHER PERSON
HAVING THE SAID PETITIONER IN HIS CUSTODY;
IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

AFFIDAVIT IN SUPPORT
OF PETITION FOR WRIT
OF HABEAS CORPUS

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MICHAEL J. KOPCSAK, being first duly sworn, deposes and
says:

1. I am an attorney associated with the firm, Law
Offices of David C. Buxbaum, P.C., attorneys for petitioner herein,
and I make this affidavit in support of the annexed petition for
a writ of habeas corpus.

2. I have read the annexed petition and believe the
contents thereof to be true.

WHEREFORE, I respectfully pray that the petition be
granted, together with such other, further and different relief
as to the Court may seem just and proper.

Michael J. Kopcsak
MICHAEL J. KOPCSAK

Sworn to before me this
10th day of June, 1977.

Famela M. [Signature]
FAMELA M. [Signature]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel.,
DER-RONG CHOUR,

Petitioner,

against

BENEDICT J. FERRO, District Director,
IMMIGRATION AND NATURALIZATION SERVICE,
BUFFALO, NEW YORK, OR ANY OTHER PERSON
HAVING THE SAID PETITIONER IN HIS CUSTODY:
IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

OPPOSITION TO A WRIT
OF HABEAS CORPUS

77-CU-211

TO THE HONORABLE JUDGES OF THE DISTRICT COURT
OF THE UNITED STATES, NORTHERN DISTRICT OF NEW YORK:

COMES NOW respondents through Gustave J. DiBianco, Assistant United States Attorney, in opposition to Petitioner's Writ of Habeas Corpus and Stay of Deportation:

1. In an Order to Show Cause, dated July 18, 1974, Chour, Der-Rong (Petitioner) was charged with being an alien deserting crewman and, in connection therewith, posted a bond in the amount of \$2,500.00. (Exhibit I, II, and III)

2. Immigration Judge Emanuel, at a hearing in Deportation proceedings on September 4, 1974, found the Petitioner deportable as charged and granted him voluntary departure without expense to the Government on or before October 4, 1974, or, in the alternative, upon his failure to depart, ordered that he be deported. (Exhibit IV)

3. A Warrant of Deportation, based upon the order of the Immigration Court was issued at New York, New York, on November 29, 1974, and arrangements for deportation were completed. (Exhibit V)

4. On December 2, 1974, Petitioner was noticed to report for deportation and, in accordance with the terms of the bond, a notice to surrender the alien was sent to the obligor on the bond. (Exhibit VI and VII)

5. Failing to appear as requested and the obligor having failed to surrender the alien, the bond was duly estreated. (Exhibit VIII)

6. On June 6, 1977, the respondent was apprehended at Albany, New York, and based upon his statement to an Investigator, appeared to be a deserting crewman for whom an Order to Show Cause would lie. An Order to Show Cause was issued but, as counsel for Petitioner was advised by the Officer in Charge at Albany, New York, was terminated when the above facts became known. (Exhibit IX)

7. On June 15, 1977, arrangements were again commenced to update and complete deportation travel requirements which arrangements can be expected to be completed prior to the present hearing. (Exhibit X)

8 USC 241, 242, and 243 of the Immigration and Nationality Act and the corresponding regulations provide for notice and hearing in deportation cases in compliance with procedural due process, King Hai Chew v. Colding 344 US 590 (1953). The issuance of a Warrant of Deportation authorizes the District Director to apprehend the alien for the purposes of effecting deportation. 8 CFR 243.2. Pending deportation, the alien may be taken into custody or may be permitted to stay at large on bond or on his own recognizance depending upon whether he may abscond and the imminence of actual deportation. 8 USC 1252(c).

The facts and the evidence in this case clearly show that the Petitioner was duly ordered deported pursuant to an Order to Show Cause and a hearing provided by law. A Warrant of Deportation permitted the District Director to take the Petitioner into custody in 1974. The Petitioner was duly noticed to surrender for deportation and he failed to appear. His bond was

estreated. Under the circumstances, his custody on June 6, 1977, was pursuant to the outstanding original Warrant of Deportation. Arrangements have already been instituted for the deportation of the alien. His deportation is imminent. It must be considered that the Attorney General is proceeding with reasonable dispatch and that the District Director's determination not to release the alien on bond is in all respects proper.

Prior to being aware of the fact that the subject was an abscondee under a Warrant of Deportation issued in 1974, a new Order to Show Cause had been issued. Petitioner claims that the District Director should not have terminated same and that he desired to appeal this termination (Paragraph 20). In effect, Petitioner states that having avoided deportation once, he now has a right to be charged again and have a second hearing. This argument may be likened to a felon, having escaped prior to incarceration, now claims that he has a right to be retried for the original offense. The argument is specious.

8 CFR 243.4 authorizes an alien under a final order of deportation to request the District Director to stay deportation. "The District Director, in his discretion, may grant the stay of deportation at such time and under such conditions that he may deem appropriate." The request for stay must be made on form I-246. "Denial by the District Director of request for stay is not appealable . . ."

The facts alleged in the instant Petition discloses that the Petitioner made an oral request to stay deportation. Even if the request were in all respects proper, the decision would be the same since the District Director had considered all the facts. The allegation that the Petitioner is in possession of a labor certification or may marry a United States Citizen cannot effect the decision since the privilege of adjustment of status to lawful permanent residents under Section 245 of the Immigration &

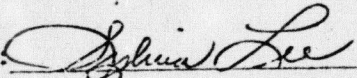
Nationality Act is not available to a deserting crewman. Moreover, the Petitioner is presently not eligible either by law or by fact for any relief which would permit him to remain in the United States. His request for Writ now is no more than a last ditch effort to avoid deportation.

WHEREFORE, it is respectfully requested that the Petition be denied in all respects, together with such other, further relief as to the Court may seem just and proper in the premises.

Dated: June _____, 1977

Guatave J. DiBianco
Assistant United States Attorney

I CERTIFY that a copy of the foregoing Opposition to a Writ of Habeas Corpus was mailed to David C. Buxbaum, Esq., Attorney for Petitioner, this 20th day of June, 1977.

By: 

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel.,
DER-RONG CHOUR.

Petitioner,

against

BENEDICT J. FERRO, District Director,
IMMIGRATION AND NATURALIZATION SERVICE,
BUFFALO, NEW YORK, OR ANY OTHER PERSON
HAVING THE SAID PETITIONER IN HIS CUSTODY;
IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

SUPPLEMENTARY ANSWER IN
OPPOSITION TO A WRIT OF
HABEAS CORPUS

77-CU-211

TO THE HONORABLE JUDGES OF THE DISTRICT COURT
OF THE UNITED STATES, NORTHERN DISTRICT OF NEW YORK:

COMES NOW respondents through Gustave J. DiBianco, Assistant United States Attorney, in supplementary answer to Petitioner's Writ of Habeas Corpus and Stay of Deportation:

On this date, June 24, 1977, a transcript of the original hearing, dated September 4, 1974, was received by this Office from the New York Office. In answer to the Petitioner's naked assertion that he did not receive due process or that his rights were violated, the transcript of the hearing shows that the hearing was conducted in the Petitioner's Mandarin language with an interpreter of the Immigration and Naturalization Service; that he (Petitioner) was advised that the purpose of the hearing was to determine whether he was deportable; and that he had a right to have an attorney or other representative of his own choice. The hearing further shows that he elected to speak for himself. Thereafter, he, the Petitioner, admitted that he was not a citizen of the United States, that he entered the United States on February 10, 1974, as a crewman and that he stayed beyond that time without permission. The

Petitioner acknowledged that the Government's right to deport him and chose to accept the discretionary privilege of voluntary departure permitted under Section 244(e) of the Immigration and Nationality Act, 8 USC 1254. The transcript shows that prior to the close of the hearing, the Immigration Judge rendered his decision and advised the Petitioner that the interpreter would translate his decision to him. Exhibit XI. Clearly the hearing shows that the Petitioner understood the nature of the proceedings and was given every consideration consonant with due process and the requirements under Section 241 of the Immigration and Nationality Act, 8 USC 1251, Section 242 of the Immigration and Nationality Act, 8 USC 1252, Section 243 of the Immigration and Nationality Act, 8 USC 1253.

In Paragraph 21 of the Petition for a Writ of Habeas Corpus, it is alleged that the notice to the Petitioner was defective and that he (Petitioner), therefore, should not be properly held to have forfeited his bond. (Counsel's Petition for a Writ reflects a very obvious confusion. It would appear that counsel believes that the bond was posted in connection with the second Order to Show Cause issued in 1977 upon the Petitioner's apprehension and terminated upon a finding that he was an alien under a Warrant of Deportation.)

Section 243.3 Code of Federal Regulations entitled Expulsion, requires that an alien under a Warrant of Deportation "shall be given not less than 72 hours advance notice, in writing, of the time and place of his surrender completely ready for deportation". It does not require that he be given notice by certified mail as was done in this case. Exhibit XII. The return receipt, a copy of which is attached hereto and made a part hereof, shows that the letter was addressed to the Petitioner at 601 West 102nd Street, New York, New York, his last known address, and was signed by "Chang" - - - the name of the sponsor of the Petitioner's bond and with whom the Petitioner

was residing. A further inquiry of the bonding company by Sylvia Lee, an employee of the Immigration Service, who personally telephoned the bonding company (obligor), disclosed the bonding company (obligor) had personally telephoned the sponsor of the bond and sent a copy of their notice to him. Exhibit XIII. Moreover, under Section 265 of the Immigration and Nationality Act, 8 USC 1305 he is required to register in January of each year with the Immigration and Naturalization Service. It is significant that the alien Petitioner here did not register for the years 1975, 1976 or 1977. Exhibit XIV. In short, he did not surface until the time of his apprehension.

It was stated in the preliminary answer in opposition to the Writ of Habeas Corpus that it was anticipated that arrangements for deportation were in the process of being completed. It may now be stated that arrangements ARE COMPLETED and, therefore, there is no longer any issue as to whether the Government is proceeding with deliberate dispatch as hereinbefore discussed.

WHEREFORE, the respondents respectfully renew their prayer for relief.

Dated: June ____, 1977

Gustave J. DiBianco

I CERTIFY that a copy of the foregoing Supplementary Answer to Opposition to a Writ of Habeas Corpus was mailed to David C. Buxbaum, Attorney for Petitioner, this 24th day of June, 1977.

Sylvia Lee

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel.,
DER-RONG CHOUR,

Petitioner,

TRAVERSE

- against -

77 Civ. 211

BENEDICT J. FERRO, District Director,
Immigration and Naturalization Service,
Buffalo, New York, Or Any Other Person
Having The Said Petitioner In His Custody;
IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

Petitioner, for his traverse of the "Opposition To A Writ Of Habeas Corpus" and "Supplementary Answer In Opposition To A Writ Of Habeas Corpus", alleges:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs numbered "1", "3", "4", "5", "6", and "7" of the "Opposition To A Writ Of Habeas Corpus."
2. Denies the allegations of the last unnumbered paragraph of page 2, including that portion which is on page 3; the first and third unnumbered paragraphs of page 3, including that portion which is on page 4 of the "Opposition To A Writ Of Habeas Corpus."
3. Denies the allegations of the first unnumbered paragraph of page 1, including that portion which is on page 2; and the first full unnumbered paragraph of page 2 of the "Supplementary Answer In Opposition To A Writ Of Habeas Corpus."

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last unnumbered paragraph of page 2, including that portion appearing on page 3; and the first full paragraph of page 3 of the "Supplementary Answer In Opposition To A Writ Of Habeas Corpus".

FOR A SUPPLEMENT TO THE PETITION HEREIN

5. That petitioner was denied due process of law under the Fifth Amendment to the United States Constitution at his deportation hearing in that he was not permitted to exercise the rights given him by statute and the rules of the Immigration and Naturalization Service.

6. That petitioner was arbitrarily, capriciously and unlawfully denied his rights at the hearing, among others, to:

- (a) be represented by an attorney;
- (b) cross-examine witnesses;
- (c) offer evidence;
- (d) examine the evidence against him;
- (e) appeal to the Board of Immigration Appeals; and
- (f) be informed of the foregoing rights.

7. That because of the foregoing, the hearing was fatally defective and the order of deportation issued pursuant thereto must be vacated. Petitioner, upon information and belief, is being held pursuant to such deportation order and should be released, as the order was issued in violation of petitioner's aforesaid rights.

WHEREFORE, petitioner prays that his petition for a writ of habeas corpus be granted in all respects and that he be promptly

released, together with such other, further and different relief as to the Court may seem just and proper.

Dated: New York, New York
June 28, 1977

LAW OFFICES OF DAVID C. BUXBAUM, P.C.
Attorneys for Petitioner

By: /s/

Michael J. Kopcsak

11 Broadway, Suite 1612
New York, New York 10004
(212) 425-4347

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MICHAEL J. KOPCSAK, being duly sworn, deposes and says:

1. I am an attorney associated with the firm, Law Offices of David C. Buxbaum, P.C., attorneys for the petitioner herein.

2. I have read the annexed Traverse and believe the contents thereof to be true.

/s/
MICHAEL J. KOPCSAK

Sworn to before me this
28th day of June, 1977.

/s/
PAMELA M. OWEN
NOTARY PUBLIC, State of New York
No. 24-4026837
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1978

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

In the Matter of

: MOTION TO REOPEN

Der-rong CHOUR

: A15 196 357

Respondent Der-rong Chour, By his attorneys, Law Offices of David C. Buxbaum, P.C., upon the annexed affidavit of Michael J. Kopcsak, sworn to the 16th day of June, 1977, hereby moves the Immigration and Naturalization Service to reopen a decision made after a hearing on September 4, 1974, which, upon information and belief, ordered respondent deported to Hong Kong, but, permitted respondent voluntary departure at a date to be set in the future, on the following grounds:

- A. That Respondent, Who Was Not Represented By An Attorney At His Hearing And Who Spoke Little, If Any, English, Did Not Knowingly Waive His Right To Apply For Adjustment Of His Status Or An Extended Date Of Deportation.
- B. That Respondent Never Received Notice Of The Inquiry Officer's Final Determination, Contrary To 8 C.F.R. §§ 242.18 and 242.19, So That It Could Not Be Said That He:
 - 1) waived his right to appeal the determination as to his departure date;
 - 2) overstayed his departure date; or
 - 3) breached the terms and conditions of his bond.

C. That New Facts Have Developed Since The Date Of The Determination:

- 1) respondent has received a Department of Labor certification as a mechanic, which would entitle him to a sixth preference and to seek an adjustment of his status;
- 2) respondent is engaged to marry a permanent resident of the United States; and
- 3) respondent was not notified of his final departure date, which notification was an essential part of the Inquiry Officer's determination;

and upon reopening, to:

D. A New Hearing On The Issues Of:

- 1) whether respondent should now be deported;
- 2) whether the terms of his bond were breached; and
- 3) whether he should be released, either on his present bond or such additional bond as may be found appropriate.

Dated: New York, New York
June 16, 1977

Respectfully Submitted,

LAW OFFICES OF DAVID C. BUXBAUM, P.C.

By:

Michael J. Kopcsak
Michael J. Kopcsak

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

In the Matter of

Der-rong CHOUR

: AFFIDAVIT

: A15 196 857

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MICHAEL J. KOPCSAK, being duly sworn, deposes and says:

1. I am an attorney associated with the Law Offices of David C. Buxbaum, P.C., attorneys for respondent, and I make this affidavit in support of the relief requested in the annexed motion to reopen, made pursuant to the rules and regulations of this Department and the applicable statutes, including 8 C.F.R. § 242.22. I make this affidavit upon information and belief, the grounds thereof being telephone conversations between Mr. Chour and Mandarin-speaking personnel of my office, as I have been unable, for the reasons stated below to view the administrative record in this matter.

2. There is currently pending in the United States District Court for the Northern District of New York a Petition For A Writ Of Habeas Corpus filed on June 10, 1977 by the above-captioned respondent. Annexed hereto, and made a part hereof, marked Exhibit "1", is a copy of that petition. The petition reflects the facts as they were understood by me late in the afternoon hours of June 9, 1977 through the early morning hours of June 10, 1977. The Court, per Judge Edmund Port, has ordered that respondent (the petitioner in the District Court) be kept in the Northern District pending final determination of the petition,

a hearing on which has been scheduled for June 29, 1977, with a pending application to advance the date thereof to June 22, 1977.

3. Upon information and belief, Mr. Chour is currently being held by the I.N.S. in Troy, New York, within the Northern District of New York, and the I.N.S. has taken the position that he cannot be released, even by posting addition bond.

4. Because of the economic burden upon Mr. Chour and the difficulty involved in commuting to Buffalo, Auburn (where Judge Port sits) and Troy, Judge Port has ordered that discovery of the administrative record in this case be made by mail, but I have not yet received such records from the I.N.S.

5. Since the date of the petition, I have been informed of the following additional facts by the Assistant United States Attorney assigned to the court matter and by Michael Landon, the I.N.S. Deputy District Director. On September 4, 1974, a hearing was held on the issue of whether or not respondent was a deportable alien. At that time, respondent was present and ordered deported to Hong Kong. On November 29, 1974, a deportation warrant was issued ordering respondent to report for deportation on December 12, 1974.

6. Upon information and belief, respondent, Mr. Chour, who was not represented by an attorney at the hearing held on September 4, 1974, and who is unfamiliar with our system of law and speaks Mandarin and very little, if any, English, did not knowingly waive his right to apply for adjustment of his status or an extended date of deportation.

7. Upon information and belief, the following occurred at, and after, respondent's hearing. Respondent was found to be a deportable alien, but granted voluntary departure. No definite departure date was set by the Inquiry Officer at that time as

respondent was informed that he would be granted an extension, and that the final departure would be set in the future and that he would receive notice thereof. Respondent was released on \$2,500 bond. Respondent thereafter received no notice of his departure date, and while awaiting notice, continued to pay interest on his \$2,500 bond, at least through July, 1976. (8 C.F.R. §§ 243.4 and 244.2). 8 C.F.R. §§ 242.18 and 242.19 provide that the Inquiry Officer is to render a decision and that the respondent be notified thereof. As previously stated, however, respondent was never notified thereof insofar as his final departure date is concerned. Therefore, it could not be said that he:

- 1) waived his right to appeal the determination as to his departure date;
- 2) overstayed his departure date; or
- 3) breached any of the terms and conditions of his bond,

and, upon information and belief, no hearing has ever been held on any of these questions. Of course, it has long been held that aliens are entitled to equal protection of the law and due process. Wong Wing v. U.S., 163 U.S. 228 (1896); Yick Wu v. Hopkins, 118 U.S. 356 (1886); Chlomos v. Dept. of Justice, I.N.S., 516 F. 2d 310 (3rd Cir. 1975). It has also been held that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. Fuentes v. Shevin, 407 U.S. 67, 80 (1972). In the present case, there was not only a violation of the federal regulations, but also, there was a lack of due process, a lack of an opportunity to be heard in a meaningful fashion and a lack of proper notice.

8. Upon information and belief, there are new and substantial facts which have developed since the hearing. These include the following:

- 1) respondent has received a Department of Labor certification as a mechanic, which would entitle him to a sixth preference and to seek an adjustment of his status;
- 2) respondent is engaged to marry a permanent resident of the United States; and
- 3) respondent was not notified of his final departure date, which notification was an essential part of the Inquiry Officer's determination.

Adjustment of Status

A person entering the United States as a seaman or crewman (as was apparently held to be respondent's status) is not ineligible to obtain an immigrant visa from a consular officer under provisions of the C.F.R. and U.S. Code. (See Aliens Ineligible To Receive Visas, 22 C.F.R. § 42.91.) Thus the respondent (if found to be a crewman) is eligible to receive a visa pursuant to a sixth preference as a mechanic. Although 8 U.S.C. § 1255 does state that the Attorney General may adjust the status of aliens other than alien crewmen, it does not say that an alien crewman is prohibited from adjusting his status through a visa office established by the Secretary of State under the Bureau of Security and Consular Affairs (8 U.S.C. § 1104(b)(c)). The manner in which an alien crewman adjusts his status to that of nonimmigrant person admitted for permanent residence is to process his application through the I.N.S., and if necessary, first through the Labor Department, and after a favorable adjudication in the United States, to adjust his status outside the United States at

an American Embassy or Consulate either in his home country or Canada. This practice, which is common and has been employed by numerous alien crewmen, is clearly available to respondent in this case, and he, like many immigrant seamen, can adjust his status and lawfully remain in the United States pending the adjustment.

Because respondent was not fully informed of his rights and not represented by an attorney, this alternative was denied to him. His certification is, upon information and belief, a new fact which was not known or knowable at his hearing.

Respondent's Engagement To Marry A Permanent Resident

Because, upon information and belief, respondent is engaged to marry a permanent resident of the United States, there is considerable equity in favor of his remaining in the United States pending an application to adjust his status as above-mentioned. This, too, upon information and belief, is a new fact, not known or knowable at the time of his hearing.

Failure To Be Notified Of Departure Date

As already stated above, the failure to notify respondent of his final departure date is relevant to whether or not he received notice of the Inquiry Officer's final determination and thus whether he waived his rights to appeal the determination; overstayed his departure; or breached the terms and conditions of his bond. It, too, is a new fact, having occurred since the hearing, and not known or knowable at the hearing.

9. Since at least three new facts are stated in paragraph "8" above, it is respectfully submitted that this motion to reopen should be granted. In Yee Dai Shek v. INS, 541 F. 2d 1067 (4th Cir. 1976), the United States Court of Appeals for the Fourth Circuit held that where new facts had occurred after a deportation

proceeding, the Board of Immigration Appeals had abused its discretion in denying a motion to reopen and there is no reason why this rule should not here be followed.

10. Judge Port has been informed, and has in fact suggested, that respondent pursue every possible administrative remedy pending a hearing on the petition for a writ of habeas corpus. It is not believed, either by Judge Port, or this deponent that the pending judicial action should in any way affect this application for administrative relief. Cf. Matter of Au, 13 I. & N. Dec. 133 (1968).

11. It is respectfully requested that this application be heard speedily and that the motion to reopen be granted, and upon reopening, a hearing be held as to:

- 1) whether respondent should now be deported;
- 2) whether the terms of his bond were breached; and
- 3) whether he should be released, either on his present bond or such additional bond as may be found appropriate.

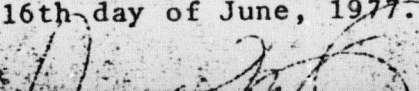
Upon information and belief, respondent has been incarcerated since June 7, 1977, is not a danger or security risk, and failed to appear for deportation only because he was not notified of the final date thereof. It is therefore respectfully submitted that no reason exists why respondent should not speedily be granted a bond hearing and released on such terms as may be reasonable.

WHEREFORE, it is respectfully prayed that respondent's motion be granted in all respects.


MICHAEL J. KOPCSAK

Sworn to before me this

16th day of June, 1977.



June 27, 1977

OPPOSITION TO MOTION TO REOPEN

Under 8 CFR 242.22, a respondent in Deportation Proceedings may move to reopen the deportation hearing: "A Motion to Reopen will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing."

Respondent, in allegations A and B of the Motion to Reopen, fundamentally attacks due process in connection with his original hearing and order of deportation. The transcript of that hearing reflects that he was advised of his right to counsel and that he knowingly waived same; that he was informed of the matter of the proceedings and affirmed that he understood; and that he admitted all of the allegations of the original Order to Show Cause and was satisfied with the decision of the Immigration Judge. Moreover, the entire hearing was conducted through the facilities of an official Immigration interpreter in the Respondent's language. At the very close it is reflected that the Immigration Judge proffered a copy of the decision as required and that this also was translated to the Respondent. Clearly there is no merit to the Respondent's contentions.

The decision of the Immigration Judge reflects that the Respondent was granted voluntary departure without expense to the Government, on or before October 4, 1974. The Government has not received and the file does not reflect any applications for extensions. It follows, to say the least, that the Respondent overstayed the time of his departure. Indeed, though not germane to the jurisdiction of the Immigration Judge, a Warrant of Deportation was subsequently issued, a notice to surrender mailed, and the Respondent's bond duly forfeited when he failed to appear.

In Paragraph C of Motion to Reopen, Respondent alleges new facts: a Department of Labor Certification as a mechanic; that he is engaged to marry a permanent resident of the United States; and that he was not notified of his final departure date. The Respondent is a deserting crewman. It is respectfully submitted that none of these facts warrant a reopening of the deportation hearing or a stay of deportation.

WHEREFORE, it is respectfully submitted that the Motion to Reopen be denied.

Dated: June 27, 1977

Respectfully submitted,

Leonard Leopold, Trial Attorney

I CERTIFY that a copy of the foregoing Opposition to Motion to Reopen was mailed to David C. Buxbaum, Esq., Attorney for Respondent, this ____ day of June, 1977.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel.,
DER-RONG CHOUR,

Petitioner,

77 Civ. 211

- against -

ORDER TO SHOW CAUSE

BENEDICT J. FERRO, District Director,
Immigration and Naturalization Service,
Buffalo, New York, Or Any Other Person
Having The Said Petitioner In His Custody;
IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

Upon the annexed petition and the affidavit of Michael J. Kopcsak, sworn to the 10th day of June, 1977, in support thereof, it is

ORDERED, that the respondents show cause at a motion term of this Court, to be held at the Courthouse thereof, located at the United States Post Office, 2nd Floor, Genesee Street, Auburn, New York, on the 29th day of June, 1977, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard why an order should not be made herein granting a writ of habeas corpus quashing the warrant of deportation issued by respondents against petitioner herein and releasing petitioner on such bond and on such conditions as the Court may determine to be reasonable under the circumstances of this case, and it is further;

ORDERED, that the petitioner be personally produced at the time and place that this order has been made returnable, and it is further,

ORDERED, that respondents, immediately upon receipt hereof, forward copies of the charges, if any, and of any and all papers and proceedings in relation to the petitioner's case before the Immigration and Naturalization Service, together with a return, pursuant to 28 U.S.C. § 2243, certifying the true cause of the petitioner's detention, to petitioner's attorneys herein, Law Offices of David C. Buxbaum, P.C., at 11 Broadway, Suite 1612, New York, New York 10004, by special delivery mail, the cost of reproduction and mailing ordered herein to be borne by petitioner, and it is further,

ORDERED, that petitioner is not to be removed from the Northern District of New York pending final determination of the petition for a writ of habeas corpus herein, and it is further,

ORDERED, that service of a copy of this order together with the papers upon which it was granted, on Benedict J. Ferro, District Director, Immigration and Naturalization Service, Buffalo, New York, at 68 Court Street, Buffalo, New York 14202, and upon the United States Attorney for the Northern District of New York at the United States Post Office and Courthouse, Albany, New York 12207, by ordinary mail on or before June 20, 1977, shall be sufficient service of this order.

Dated: Auburn, New York
June 15, 1977

LS/ EDMUND PORT
United States District Judge

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A15 196 857 - Buffalo, New York

June 27, 1977

In re: Der-rong CHOUR

In Deportation Proceedings

Application: Motion to Reopen Proceedings

In Behalf of Respondent:

In Behalf of Service:

Michael J. Kopcsak, Esquire
Law Offices of David C. Buxbaum, P.C.
Suite 1612 - 11 Broadway
New York, New York 10004

Leonard Leopold
Trial Attorney
Buffalo, New York

ORDER OF THE IMMIGRATION JUDGE

UPON READING AND CONSIDERING respondent's motion to reopen deportation proceedings; and the Immigration Service opposition thereto;

Immigration Judge Emanuel now being retired, therefore, jurisdiction lies;

There has been no showing of lack of due process;

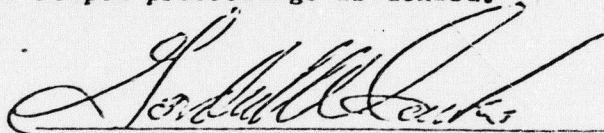
Respondent being a crewman, is precluded from adjustment to permanent residence under Section 245 of the Immigration and Nationality Act;

Bond breach is not within this Court's jurisdiction;

Release under warrant of deportation is not within this Court's jurisdiction;

No basis having been shown upon which new hearing may be granted;

ORDER: IT IS ORDERED this motion to reopen proceedings is denied.


GORDON W. SACKS, Immigration Judge

JUN 29 1977

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORKAT O'CLOCK M.
J. R. SCULLY, Clerk
AUBURNUNITED STATES OF AMERICA, ex rel.
DER-RONG CHOUR,

Petitioner,

vs.

77-CV-211

BENEDICT J. FERRO, District Director,
IMMIGRATION AND NATURALIZATION SERVICE,
BUFFALO, NEW YORK, OR ANY OTHER PERSON
HAVING THE SAID PETITIONER IN HIS CUSTODY
IMMIGRATION AND NATURALIZATION SERVICE. *I certify that this is a true copy*

Respondents.

Attest

APPEARANCES:

DAVID C. BUXBAUM, ESQ.
11 Broadway, Suite 1612
New York, New York 10004
Attorney for PetitionerPAUL V. FRENCH
United States Attorney
Federal Building
Albany, New York 12201
Attorney for Respondents

EDMUND PORT, Judge

J. R. SCULLY,
Clerk, U.S. District CourtBy: *James K. Evans*
DeputyGUSTAVE J. DiBIANCO
Assistant U.S. Attorney
Of CounselORDER

The above-entitled matter having come on to be heard before this court on the return date of an order to show cause on June 29, 1977 at Auburn, New York and the parties having stipulated upon the record that neither side had any oral evidence to present and that the matter should be decided upon the papers before the court and the court having heard the argument of the parties and having dictated its decision on the record, it is

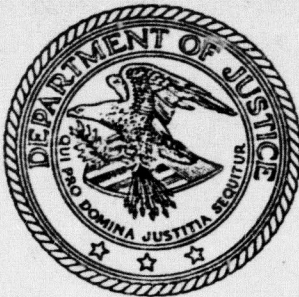
ORDERED, that the petition for a writ of habeas corpus be and the same hereby is denied in all respects, and it is further

ORDERED, that the restriction on the removal of the petitioner from the Northern District of New York contained in said order to show cause be continued for a period of ten days, as amended by stipulation of the parties staying his removal from the State of New York instead of the Northern District of New York, and it is further

ORDERED, that the application for the release of the petitioner upon such conditions as the court deems proper, pending further proceedings, be and it hereby is denied.

Senior U.S. District Judge

Dated: June 29, 1977
Auburn, New York



United States Department of Justice

Board of Immigration Appeals

Washington, D.C. 20530

JUL 14 1977

File: A15 196 857 - Buffalo

In re: DER-RONG CHOUR

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: David C. Buxbaum, Esquire
11 Broadway, Suite 1612
New York, New York 10004

ON BEHALF OF I&N SERVICE: Leonard Leopold
Trial Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251
(a)(2)) - Nonimmigrant crewman -
remained longer

APPLICATION: Reopening

This is an appeal from a decision of an immigration judge dated June 27, 1977 denying the respondent's motion to reopen the proceedings against him. The respondent's appeal will be dismissed.

The respondent is a 30-year-old native and citizen of China. He was admitted to the United States at Baltimore, Maryland on February 10, 1974 as a nonimmigrant crewman authorized to remain in the United States for a period not to exceed 29 days. He has remained in the United States beyond his authorized period of stay.

A15 196 857

In a decision dated September 4, 1974, the respondent was found deportable by an immigration judge and was granted the privilege of voluntary departure to be effected not later than October 4, 1974. The respondent did not depart by that date.

The respondent's motion to the immigration judge requested the reopening of the proceedings against him, basically, on the ground that he was denied due process of law at the time of the September 4, 1974 hearing.

The respondent has not made a showing that reopening of these proceedings is warranted.

Although the respondent was not represented by an attorney at the September 4, 1974 hearing, we are convinced that he effectively waived his right to counsel at the hearing. See Barthold v. INS, 517 F.2d 689 (5 Cir. 1975); Tupacyupanqui-Marin v. INS, 447 F.2d 603 (7 Cir. 1971). Although the respondent was not then advised of his right to cross-examine witnesses against him as required by the regulations, in view of the fact that the finding of deportability was based upon his own admissions at the hearing and he was granted the only discretionary relief available to him, the error was harmless. We are satisfied that the conduct of the September 4, 1974 hearing was not of such a nature as to vitiate the finding of deportability. See Healha v. Shaughnessy, 219 F.2d 600 (2 Cir. 1955).

The appeal will be dismissed.

ORDER: The appeal is dismissed.

Chairman

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

No.

ORDER TO SHOW CAUSE, NOTICE OF HEARING, AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA:

File No. A15 106 857

s Order to
w, Cause super-
es the Order
Show Cause
ued July 17,
4.

In the Matter of CHOUR, Der Rong

Respondent.

284 Main Street, Great Barrington, Massachusetts
Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of China and a citizen of China;
3. You entered the United States at Baltimore, Maryland on February 10, 1974 or about February 10, 1974;
4. At that time ^(gate) you were admitted as a crewman authorized to remain in the United States for the period your vessel remained in port, not to exceed 29 days;
5. You have remained in the United States beyond 29 days without authority of the United States Immigration and Naturalization Service;

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act, in that, after admission as a nonimmigrant under Section 101(a)(15) of said act, you have remained in the United States for a longer time than permitted.

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at Room 726 A John F. Kennedy Federal Building, Government Center, Boston, Massachusetts 02203

on August 9, 1974 at 9:00 a.m. and show cause why you should not be deported from the United States on the charge(s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated: July 13, 1974

John F. Kennedy
(Signature and Title of Issuing Officer)
District Director, Boston, Massachusetts
(City and State)

EXHIBIT

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

MATTER OF

SCHOUR, DEL RONG

FILE A- 15 196 857

IN DEPORTATION

PROCEEDINGS

TRANSCRIPT OF HEARING

Before: EDWARD P. EMANUEL, Immigration JudgeDate: Sept. 4, 1974 Place: New YorkTranscribed by Sylvia Davis At N.Y.Official Interpreter ChungLanguage Mandarin - Chinese

APPEARANCES:

For the Service:

Anthony M. De Gaeto

Trial Attorney

Trial AttorneyNew York Station

For the Respondent:

no one

EXHIBIT

XI

A15 196 857

1 IMMIGRATION JUDGE TO RESPONDENT THROUGH OFFICIAL INTERPRETER:

2 Q. Sir, is the Chinese language you speak and understand the best?

3 A. Mandarin

4 Q. What is your real name, please?

5 A. Schour Del Rong.

6 Q. The government claims that you are a deportable alien for staying in
7 this country longer than allowed. This hearing is to find out whether
8 or not you are deportable and if you are, then what must be done in
9 your case. Do you understand?

10 A. Yes.

11 Q. You have a right to have a lawyer or other authorized representative of
12 your own selection but without cost to the government. However, you
13 are not required, you are not authorized to have such a person, you
14 can go ahead without one and speak for yourself as you prefer. What
15 will you do about having or not have such a person?

16 A. I will speak for myself.

17 I.J. Alright, the hearing will proceed in that manner.

18 Q. How old are you please?

19 A. 28.

20 I.J. The original Order to Show Cause is received as exhibit 1.

21 Q. Are these claims which the government makes about you each true?
22 First, that you were born in China and that you are a citizen of China?

23 A. Yes.

24 Q. That you are not a United States citizen. Is that true?

25 A. Correct.

26 Q. That you entered the United States about February 10, 1974. Is that True?

-1-

TRANSCRIPT OF HEARING

United States Department of Justice — Immigration and Naturalization Service

1 A. Yes.

2 Q. At that time were you allowed to enter this country temporarily as a
3 crewman, permitted to stay no longer than 29 days?

4 A. Yes.

5 Q. However, did you stay in this country longer than that time without
6 permission from Immigration?

7 A. Right.

8 Q. Because of that do you admit now that the government has the right to
9 deport you?

10 A. Yes.

11 Q. Do you want to be deported or do you want to leave on your own. We call
12 that voluntary departure.

13 A. I will ^{leave} voluntarily.

14 Q. Do you have any close family or relatives who are citizens or who are
15 legal resident of this country?

16 A. No just friends.

17 I.J. Please do not worry merely because of this question, it is asked of
18 everyone. If you have to be deported to which place would you want
19 to be deported?

20 A. I will leave on my own.

21 I.J. I trust that you will leave on your own. However, I must make
22 provision if you do not leave on your own, that you be deported to some
23 place. In the event you have to be deported to which place would you
24 want to be sent?

25 A. To Taiwan.

26 I.J. Mr. De Gaeto, is any request for alternate?

TRANSCRIPT OF HEARING

United States Department of Justice — Immigration and Naturalization Service

1 T.A. Yes, your honor, Hong Kong.

2 I.J. Mr. Schour, if I give you one month to leave on your own but provide
3 if you do not leave by that time, that you be deported. Is such a
4 decision, satisfactory to you?

5 A. Please your honor I haven't been here too long yet and if you will give
6 me a little bit more time, I can really buy my own ticket and go.

7 I.J. You have already been here about 5 or 6 months longer than allowed.
8 If I give you the one month are you saying that you will be out by the
9 time required of you?

10 A. I have a lot of economic problems at home and that is why I left the ship.

11 I.J. Sir, if you wouldn't leave the United States by the time now required,
12 which will be one month, then I must order that you be deported. Do
13 you want to be ordered deported or are you saying that you will be out
14 by one month, unless that time be extended by Immigration?

15 A. In a month I might not be able to buy my own ticket. If you will give
16 me a little bit more time.

17 I.J. I will not give you more time. If you show that you have been diligent-
18 ly able to buy a ticket but cannot do so, then come back here a few days
19 before the month is up and maybe if you have a good reason an extension
20 of time will be then given to you. Do you understand?

21 A. Alright.

22 I.J. However, I cannot give you any assurances of any extension because at
23 that time I have nothing to do with that. Do you understand?

24 A. I understand.

25 I.J. I will give you as I said one month to leave voluntarily. If you do
26 not leave by that time unless the time be extended, here is my order

TRANSCRIPT OF HEARING

United States Department of Justice — Immigration and Naturalization Service

1 that you be deported to Taiwan and if not acceptable there, then to
2 Hong Kong. Are you saying that you be satisfied with such a decision?

3 A. I understand the Taiwan, peace.

4 Q. In Hong Kong would you be harmed for any reason?

5 A. I don't want to go to Hong Kong.

6 I.J. Here is my decision. The interpreter will translate it to you. This
7 is the one which takes effect and also tell him about where he goes.
8
9
10
11

12 I hereby certify that to the best of my knowledge and
13 belief the foregoing pages numbered 1 through 4
14 are a complete and accurate transcript of the above-
described proceedings.

15 Sylvia Davis
Signature

16 Interpreter
Title
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24
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26

TRANSCRIPT OF HEARING

United States Department of Justice — Immigration and Naturalization Service

IMMIGRATION JUDGE TO RESPONDENT (Through official interpreter).

Q. Sir is Chinese the language you speak and understand best?

A. Mandarin.

Q. What is your real name please.

A. Chour Der Rong

Q. The Government claims that you are a deportable alien, staying in this country longer than allowed. This hearing is to find out whether you are deportable and if you are then what must be done in your case. Do you understand?

A. Yes.

Q. You have a right to have a lawyer or other representative of your own selection without cost to the Government. However, you are not required you are not forced to have such a person, you can go ahead without one and speak for yourself, if you prefer. What will you do about having or not having such a person?

A. I will speak for myself.

I.J. Alright, we will proceed in that manner.

I.J. Q. How old are you, please.

A. 28.

Q. The Original Order to Show Cause is received as exhibit #1.

Are these claims, ^{that the Government makes about you each true.} first that you were born in China

and a citizen of China.

A. Yes.

Q. That you are not a U.S. citizen? Is that true?

A. Correct.

Q. That you entered the United States about Feb. 10, 1974. Is that true?

-1-

TRANSCRIPT OF HEARING

United States Department of Justice -- Immigration and Naturalization Service

1 A. Yes.

2 Q. At that time were you allowed to enter the country temporarily as a
3 crewman to stay no longer than 29 days. Is that true?

4 A. Yes.

5 Q. However, did you stay in this country beyond that time without permission
6 from Immigration?

7 A. Yes.

8 Q. Because of that do you admit that the Government now has the right to
9 deport you?

10 A. Yes.

11 Q. Do you want to be deported or will you leave on your own. We call that
12 voluntary departure.

13 A. I will leave voluntarily.

14 Q. Do you have any close family or relative who are legal residents of
15 this country?

16 A. No, just friends.

17 Q. Please do not worry merely this question must asked of everyone, if you
18 have to be deported to which country do you wish to be sent?

19 A. I will leave on my own.

20 Q. I trust that you will leave on your own. However, I must make provision
21 if you do not leave ^{you have to be deported.} on your own.,/To which country do you wish to be sent?

22 A. Taiwan.

23 Q. If I give you one month to leave on your own, Mr. Chour, to provide if
24 you do not leave by that time you will be deported, is such a decision
25 satisfactory to you?

26 A. Please your honor, I haven't been here too long yet if you will give me

-2-

TRANSCRIPT OF HEARING

United States Department of Justice -- Immigration and Naturalization Service.

1 a little more time I can really buy my own ticket and go.

2 I.J. You have already been here 5 or 6 months longer than allowed. If I
3 give you one month, are you saying that you will be out by the time that
4 is required of you? Is that what you are saying?

5 A. I have a lot of economic problems at home and that is why I left
6 the ship.

7 I.J. If you do not leave ^{the United States} the time allowed which is one month, then I must
8 order that you be deported.

9 A. In a month I might not be able to buy my own ticket, if you will give
10 me a little bit more time.

11 I.J. I will not give you more time. If you show that you are diligently
12 been able to buy a ticket but cannot do so, then you come back here a
13 few days before the month is up. Maybe, if you have a good reason
14 an extension at that time will be given. Do you extend?

15 A. Alright.

16 I.J. However, I cannot give you any assurances of an extension because at
17 that time I will have nothing to do with that. Do you understand.

18 A. I understand.

18 I.J. Mr. De Gaeto is any request alternatively.

19 A. Yes, your honor, Hong Kong.

20 I.J. I will give you as I said one month to leave voluntarily. If you don't
21 leave by that time, unless the time is extended, here is my order that
22 you be deported to Taiwan. If you are not accepted there, then to
23 Hong Kong. Are you saying that you are satisfied with such a decision?

24 A. I understand ^{the} Taiwan piece.

25 I.J. In Hong Kong would you be home for any reason?

26 A. I don't want to go to Hong Kong.

1 I.J. Here is my decision. The interpreter will translate it to you.

2 This is the one which takes effect.

3 The hearing is closed.

4
5
6 I hereby certify that to the best of my knowledge and
7 belief the foregoing pages numbered 1 through 4
8 are a complete and accurate transcript of the above-
9 described proceedings.

10 Aylmer Davis
Signature

11 G. J. ...
Title

UNITED STATES DISTRICT COURT

11TH DISTRICT OF NEW YORK

- - - - - X

DER-RONG CHOUR

77-CV-211

VS

BENEDICT J. FERRO, District
Director, Immigration and
Naturalization Service, etc.

- - - - - X

BEFORE HON. EDMOND PORT, PRESIDING

June 29, 1977
10:30 A.M.

Appearances: Hon. Paul V. French by Gustave DiBianco
Assistant U.S. Attorney General
Federal Building
Syracuse, New York

David C. Buxbaum, P.C.
For Petitioner
Suite 1601
11 Broadway, New York, New York 10004

ALSO PRESENT: Court Clerk William Murphy

MARK L. DENNIS
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THE CLERK: Court is in session.
Der-Rong Chour versus Benedict J. Ferro,
77-CV-211.

THE COURT: Both sides ready?

MR. DiBIANCO: Yes, Your Honor.

MR. BUXBAUM: Yes, Your Honor.

MR. DiBIANCO: For the record, the
Petitioner is present in person, Your Honor.

THE COURT: I think it would be
helpful to me if you gentlemen would state
your respective positions here.

On looking at the papers the thing
seemed to have resolved itself.

MR. BUXBAUM: I would think so, Your
Honor. That certainly is my opinion.

THE COURT: Now, how has it resolved
itself, Mr. Buxbaum, in your opinion?

MR. BUXBAUM: I think it's quite
clear, Your Honor, from the papers, that
this man was denied due process during the
original alleged hearing that he had.
I think it's quite clear from the papers
that he wasn't afforded a right to counsel,

1 that he wasn't told of his rights pursuant
2 to the Code of Federal Regulations which
3 embodies what due process is.

4 THE COURT: Let's see if we can
5 agree on what the facts are first here.

6 MR. BUXBAUM: Sure.

7 THE COURT: Now, I don't think there's
8 any question, is there, that the Petitioner
9 entered the United States as a seaman?

10 MR. BUXBAUM: Your Honor, I don't think
11 that's the issue here.

12 THE COURT: I'm not asking you what
13 the issues are. I'm trying to determine
14 what the facts are.

15 MR. BUXBAUM: Sure. Well, your Honor--

16 THE COURT: Can you answer that?

17 MR. BUXBAUM: Let me just, in answer to
18 that question, Your Honor, you signed an
19 Order dated June 15, 1977, providing that
20 immediately upon a receipt thereof the
21 record was to be transmitted to us. The
22 record was never transmitted to us.

23 THE COURT: I want to get what the

1 facts are first, if you don't mind.

2 MR. BUXBAUM: It's difficult.

3 THE COURT: You object to that?

4 MR. BUXBAUM: Not at all, Your Honor.

5 THE COURT: All right. Then let's
6 do it.

7 MR. BUXBAUM: It's difficult for me to
8 know the facts without the record. We were
9 never presented with the copy of the record.

10 THE COURT: You have it now?

11 MR. BUXBAUM: No, I don't. It was
12 never presented to us.

13 THE COURT: Then you're not in a
14 position to do much of anything, are we,
15 without the facts? I certainly can't.

16 MR. BUXBAUM: We have facts about the
17 so-called Deportation Hearing upon which a
18 Deportation Order was based and the
19 question is is that Deportation Order a valid
20 Order, that's why we're here.

21 THE COURT: I got to know all the
22 facts.

23 Now, if you're not in position, maybe

1 this man's a citizen, is he?

2 MR. BUXBAUM: Your Honor, again, not
3 to my knowledge.

4 THE COURT: Let's not be silly about
5 this.

6 MR. BUXBAUM: I'm not trying to be
7 silly, Your Honor, but I can't admit to
8 facts that I don't know.

9 THE COURT: I'm not asking you to
10 admit. I'll take it from the papers. It
11 appears from the papers that this man is a
12 seaman who entered the country or, let's
13 put him on the stand, you want to take some
14 proof? He's here.

15 MR. BUXBAUM: Your Honor, that's not
16 the way we wish to proceed in this matter.

17 THE COURT: How do you wish to
18 proceed, on the papers that are available?

19 MR. BUXBAUM: On the papers that
20 have been presented to us thus far, yes.
21 We'd like to proceed on the basis of the
22 transcript.

23 THE COURT: All right. Proceed on that

1 basis then. I'll give you an opportunity.
2 You want to offer any proof?

3 MR. BUXBAUM: Well, Your Honor, first
4 of all--

5 THE COURT: First I want to stop
6 playing games now. I'm here. Is there any
7 proof you want to offer?

8 MR. BUXBAUM: Your Honor, there's a
9 transcript that was presented to us.

10 THE COURT: The transcript is in
11 evidence, it's been submitted. This is a
12 habeas corpus. I can take things by
13 affidavit. I've got it.

14 MR. BUXBAUM: You have a transcript
15 that we have presented to you and we were
16 served with.

17 THE COURT: And I have a transcript
18 that was part of the proceedings,
19 supplementary proceedings.

20 MR. BUXBAUM: There are two transcripts
21 that you have, that apparently--I've just
22 been informed of that, that apparently have
23 a conflict in it.

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THE COURT: All right.

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MR. BUXBAUM: In that transcript that we were served with by the United States Attorney and also served by the Immigration and Naturalization Service, it states in the transcript very clearly that Mr. Chour, the Petitioner, was not authorized to have a counsel. Now, that is a denial of a fundamental right. That's the transcript right there, Your Honor. It also states or it fails to state that Mr. Chour was advised of his rights to examine and cross examine witnesses and he was not advised of his right to an appeal in the transcript. He was never even informed of the decision made by the judge at the hearing.

THE COURT: Now, wait a minute.

You're referring now to the last sentence "Here is my decision. The interpreter will translate it to you." All right.

MR. BUXBAUM: The code of Federal Regulations requires the following:
CFR Section 242.16, the Special Inquiry

1 Officer shall advise the Respondent of his
2 right to representation at no expense to
3 the government." He wasn't properly
4 advised of that by counsel, of his own
5 choice, authorized to practice in the
6 proceedings and requiring him to state then
7 and there whether he desires such
8 representation. Advise the Respondent that
9 he will have a reasonable opportunity to
10 examine and object to the evidence against
11 him. He was never advised of that. To
12 present evidence in his own behalf and cross
13 examine witnesses, he was never advised
14 of that. To read the factual allegations
15 and charges and Order to Show Cause and
16 explain them in non-technical language.
17 He was never advised of that, to enter the
18 Order of Show Cause as an exhibit in the
19 record, nor was he advised of that. I think
20 it's been held by the cases and we cite
21 certain cases that deprivation of these
22 fundamental rights embodied in the
23 Constitution and Code of Federal Regulations

1 means that the Order upon which it's based,
2 the Order of Deportation which is based
3 upon this hearing must be set aside and we've
4 cited the case in our brief on Page 3 of
5 our Memorandum of Law in support of
6 Petitioner for right of habeas corpus.
7 We cite Castaneda - Delgado versus
8 Immigration and Naturalization Service
9 Court of Appeals of the Southern Circuit.

10 THE COURT: I see it.

11 MR. BUXBAUM: The Court very clearly
12 held that it's absolutely essential for
13 the Immigration and Naturalization Service
14 to abide by these rights that are granted
15 by the Constitution and the Code of Federal
16 Regulations.

17 THE COURT: Now, in that case it
18 appears, however, does it not, that that
19 was an appeal from the board. It wasn't on a
20 writ.

21 MR. BUXBAUM: That's correct, that was
22 an appeal from the board, Your Honor, but
23 in this particular--

1 THE COURT: Isn't that exactly what
2 our situation is here? You filed a
3 petition for a re-opening.

4 MR. BUXBAUM: We filed a motion to
5 re-open before the Immigration and
6 Naturalization Service, Your Honor.

7 THE COURT: Isn't that what you should
8 do?

9 MR. BUXBAUM: Well, what we should do,
10 Your Honor, is release this man from jail
11 because he's being held wrongfully on the
12 basis of a decision which was, obviously,
13 not constitutionally grounded nor grounded
14 in law, that's what we should do first.
15 Now we've asked- for a motion to re-open.
16 A motion to re-open can be asked for at
17 any time.

18 We have actually exhausted our
19 administrative remedies. A motion to reopen
20 can be made over and over and over again
21 and what we're really here for, Your Honor,
22 is to release this man because, obviously,
23 the hearing upon which he was determined

1 deportable was in violation of law. That's
2 what we're here for.

3 THE COURT: Let me hear the
4 government.

5 MR. DiBIANCO: Your Honor, first,
6 for the record I'd like to state that we
7 were served with all three of the papers,
8 the Reply Affidavit, the Memorandum of Law
9 and the Traverse at 10:15 this morning.
10 I believe it could have been more notice
11 than that, especially the Memorandum of Law.
12 I haven't had a chance to--

13 THE COURT: Do you want an adjournment
14 here?

15 MR. DiBIANCO: Not yet, Your Honor.

16 The government's position, well,
17 there's one other thing I'd like to state
18 for the record. We had arranged for an
19 interpreter to be present and it's my
20 understanding that Mr. Kopcsak, an
21 associate of Mr. Buxbaum, cancelled that
22 arrangement.

23 MR. BUXBAUM: That's not my understanding

1 at all.

2 THE COURT: Well, I appreciate the
3 assistance.

4 MR. DiBIANCO: Needless to say, there
5 is no interpreter present. We had
6 arranged for it.

7 MR. BUXBAUM: We arranged through your
8 office and your secretary was the one that
9 did the arranging, if you wanted to have
10 the interpreter here we told her that you
11 can make the arrangements. At the present
12 time, on the basis of the record that we
13 had, we didn't feel we needed an interpreter.

14 MR. DiBIANCO: What are you saying?
15 That you want an interpreter present or you
16 waive that right?

17 THE COURT: You're satisfied to
18 proceed on the record?

19 MR. BUXBAUM: We're satisfied at this
20 point to proceed on the record, yes, Your
21 Honor.

22 MR. DiBIANCO: All right. Based on the
23 papers, Your Honor, and the transcript

1 that's in evidence, that's in the papers,
2 we feel that the petitioner was given all
3 of his constitutional rights. A close
4 reading of the transcript, I believe, would
5 show that the petitioner conceded everything
6 that was alleged in the Order to Show Cause,
7 that he conceded that he was a crewman
8 or a seaman, that he overstayed his 29 days
9 and that he agreed that the United States
10 had the right to deport him and the only
11 thing he did--and that he waived his right
12 to counsel, and the only thing he did do was
13 that he negotiated for his time of
14 departure, which I believe indicates that
15 he was knowledgeable concerning immigration
16 matters. His negotiations with the
17 immigration judge resulted in certain
18 statements to the judge and it was clear that
19 he understood that he was going to be
20 deported.

21 The judge spent, it was practically a
22 whole page of the transcript spent
23 concerning the time of departure. It's

1 clearly implicit that he was going to be
2 deported.

3 There's one disturbing factor about
4 the transcript which was just called to my
5 attention this morning when I received
6 these papers, the Memorandum of Law,
7 Petitioner's Memorandum of Law quotes the
8 transcript. I'm sorry, it's the Affidavit
9 of Mr. Kopcsak, quotes the transcript at
10 Line 5 and there's a discrepancy between the
11 quote in Mr. Kopcsak's affidavit and the
12 transcript that I have attached to the
13 government's papers.

14 THE COURT: Well, the place to have
15 that resolved is before the Hearing Tribunal
16 that the transcript or that the evidence was
17 taken before. If it has to be decided here,
18 of course, it would become a question of
19 fact. Now, as a question of fact, Mr.
20 Buxbaum wants me to decide it I'll decide it.
21 You don't want any evidence? You want me to
22 decide issues I'll decide.

23 MR. DiBIANCO: May I continue?

1

THE COURT: Go ahead.

2

MR. DiBIANCO: The government's

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position is that the petitioner was given all

4

of his constitutional mandated and

5

statutorial mandated rights.

6

THE COURT: What about the advice of

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his right to appeal? What about his

8

advice to a decision?

9

MR. DiBIANCO: The decision, the

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transcript shows that the decision was going

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to be read to him. It's implicit in the

12

transcript what the decision was, that he

13

would be deported.

14

THE COURT: What about the subsequent

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written order, isn't there proof of service

16

of that on the petitioner? It seems to me

17

I remember in the original return--

18

MR. DI BIANCO: The written decision

19

of the immigration judge?

20

MR. BUXBAUM: No proof of service as

21

far as I know, Your Honor.

22

MR. DiBIANCO: We have attached to the

23

supplemental Answer, Your Honor, a photocopy

1 of a return receipt.

2 MR. BUXBAUM: That has nothing to do
3 with the decision, Your Honor. Nothing at
4 all to do with the decision.

5 THE COURT: That is the decision,
6 says he took voluntary departure.

7 MR. BUXBAUM: That's a--they're claiming
8 that they served a deportation order on a
9 man named Chour, nothing to do with the
10 decision. It's not the decision and that's
11 not what they claim in their papers.

12 THE COURT: I don't know what else a
13 decision is, that you are to be deported.

14 MR. BUXBAUM: The decision is that he
15 is to be voluntarily deported.

16 THE COURT: It doesn't have to be a
17 document.

18 MR. BUXBAUM: No. He should have been,
19 according to the CFR, he had to have been
20 told what the decision from the bench was
21 and had to be translated from the bench.

22 THE COURT: Go ahead.

23 MR. DiBIANCO: It's our position,

1 Your Honor, that the transcript is
2 abundantly clear.

3 THE COURT: What about exhaustion
4 here?

5 MR. DiBIANCO: It's my understanding
6 that this motion to reopen made by the
7 petitioner before the immigration judge, I
8 believe it was Judge Saks in Buffalo, has
9 been denied.

10 THE COURT: It's returnable tomorrow.

11 MR. BUXBAUM: That's correct. It's
12 returnable tomorrow.

13 MR. DiBIANCO: I don't have any papers
14 to indicate--

15 MR. BUXBAUM: We attempted to get it
16 heard before this particular hearing. The
17 judge insisted on having it returned tomorrow,
18 but, Your Honor, the questions that you asked,
19 where is the portion of the transcript where
20 he's advised of his right to appeal, where
21 is the portion of the transcript where he's
22 advised of the right to cross examine witnesses?
23 We have the transcript and there's no

1 discrepancy on those facts and all
2 transcripts, although there are two
3 different copies, apparently, and all copies
4 came from the U.S. Attorney's office or
5 his agent's office, we received our copy
6 from him. We received one from him in his
7 papers and one from the Immigration and
8 Naturalization Service in New York, so as
9 to a question of fact as to the transcript
10 which has to do with whether he was advised
11 properly of his right to counsel, as to that
12 question of fact it seems to me--

13 THE COURT: Mr. Buxbaum, if your
14 position is correct there wouldn't that be
15 grounds for reopening?

16 MR. BUXBAUM: Yes, it would, absolutely,
17 Your Honor, but in the meantime I don't think
18 he can be incarcerated pending a reopening.
19 He's been in jail for a heck of a long time.
20 He's not a criminal.

21 MR. DiBIANCO: Your Honor--

22 MR. BUXBAUM: I hear a lot of
23 immigration cases.

1

THE COURT: Of course. I suppose

2

he wasn't entitled as a matter of right to

3

release on bail in the first instance as

4

to seamen jumping ship.

5

MR. BUXBAUM: Yes, he is. Sure he is.

6

THE COURT: Not as a matter of right

7

he isn't.

8

MR. BUXBAUM: Unless there's some

9

reason to believe that he's such a danger to

10

society that he has to be incarcerated.

11

THE COURT: I don't know, but I don't

12

think there's any right.

13

MR. BUXBAUM: Your Honor, I do a fair

14

amount of this kind of work and, believe me,

15

very rarely--

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THE COURT: Then your whole object is--

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MR. BUXBAUM: I say very rarely do they

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keep people incarcerated this period of time

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on a first or second matter of this nature.

20

I've never seen a case--obviously practices

21

are different.

22

THE COURT: There'll be a good case

23

tomorrow.

1 MR. BUXBAUM: I don't think you'll
2 put us through that.

3 THE COURT: I think I will. I'm not
4 certain.

5 MR. BUXBAUM: The papers are clear,
6 he's not advised of his constitutional
7 right.

8 THE COURT: I think the congressional
9 scheme was for you to do just what you're
10 doing. Now, of course, they can adjudge
11 as well as I can the amount of bail, if any,
12 the type of security. Maybe the man should
13 be released on his own recognizance on the
14 history--of his recent history. I don't
15 know. If you have concluded your argument
16 and you both say there's no proof that you
17 want to present I'll recess.

18 Of course, these papers were just
19 handed to me. I haven't had an opportunity
20 to look at them. I want to look at them and
21 I want to have an opportunity to look at the
22 cases that have been submitted.

23 Mr. DiBianco if within the next half

1 or hour you want to bring in any authority
2 I'll be glad to have you do it.

3 MR. DiBIANCO: I would like to make
4 some further argument.

5 THE COURT: This is a Writ of
6 Habeas Corpus, should be disposed of promptly.
7 It will be.

8 MR. DiBIANCO: Your Honor, may I be
9 heard?

10 THE COURT: Yes.

11 MR. DiBIANCO: Just a bit.

12 THE COURT: Sure.

13 MR. DiBIANCO: In the beginning when
14 Mr. Kopcsak first appeared it was the
15 petitioner's argument that he was--that the
16 petitioner was being held unlawfully, that he
17 was arrested and that they had cancelled
18 the Show Cause Order. It's now clear that
19 this petitioner absconded and forfeited
20 bail on the original deportation.

21 THE COURT: I don't think that Mr.
22 Buxbaum's relying on his original assertions.
23 It was obvious that he took the position,

1 I don't know what happened, this fellow
2 called me up on the phone and I just don't
3 want him to be put on a plane and when I
4 wake up my bank account, my client are in
5 Taiwan.

6 MR. BUXBAUM: Yes, that's exactly--

7 MR. DiBIANCO: What I would like to
8 bring out is the fact that this petitioner
9 has been in the United States more than
10 three years unlawfully, remaining more than
11 29 days as a crewman. He has been employed.
12 He has made false statements to not only
13 the immigration judge--

14 THE COURT: Some illegal aliens have
15 been here with the knowledge of the court
16 and the Immigration Service and reported
17 in cases for ten years through the
18 machinations of themselves and knowledgeable
19 counsel and the courts.

20 MR. DiBIANCO: Perhaps that's true.

21 MR. BUXBAUM: Your Honor, you know
22 there's a pending legislation before the
23 administration right now where the

1 government feels that immigrants who have
2 been here for a considerable period of time--

3 THE COURT: I'm aware of it and, of
4 course, that's not my business. That's the
5 Congress' and I don't think that that can
6 guide me in the judicial determination either.
7 If I try to predict, to make my decisions
8 depend on what I thought the Congress is
9 going to do, God help the judiciary.

10 MR. DiBIANCO: The only reason I raise
11 that argument, Your Honor, is petitioner
12 in his papers raises the argument of equity
13 and I don't think there's any equity whatso-
14 ever. I do have--I was handed by Mr.
15 Levender (Phonetic) the deportation officer,
16 a decision, a photocopy of what appears to be
17 a decision of Gordon W. Saks, Immigration
18 Judge, dated June 27, 1977. I'll be happy
19 to make copies of this and show it to counsel.
20 It appears--

21 THE COURT: Mark it as an exhibit
22 if you want it before me.

23 MR. BUXBAUM: We have absolutely no

1 knowledge of this.

2 MR. DiBIANCO: Either did I until about
3 30 seconds ago.

4 THE COURT: Can it be authenticated?

5 MR. DiBIANCO: I believe so, Your
6 Honor.

7 THE COURT: All right.

8 MR. BUXBAUM: This is unbelievable
9 because--

10 THE COURT: None of this stuff is
11 unbelievable.

12 MR. BUXBAUM: We argued for an early
13 decision and Leonard Leopold insisted that
14 he didn't want the decision until he
15 presented papers and he never presented papers
16 in his motion, to my knowledge. How can it
17 happen that a decision without him
18 presenting papers --

19 THE COURT: What is it?

20 MR. BUXBAUM: It's a decision by
21 an immigration judge on June 27, 1977 on a
22 motion to reopen and we had an oral hearing
23 before the judge by telephone.

Tape 1

1 THE COURT: That would give you the
2 right to go to the Court of Appeals:

3 MR. BUXBAUM: Yes, it would indeed give
4 us the right to go to the Court of Appeals.
5 I don't think I have to. I think you really
6 should take the bull by the horn and look
7 at this decision and constitutional rights
8 and I can't justify keeping this man in-
9 carcerated.

10 THE COURT: Anything else?

11 MR. BUXBAUM: There's one other thing,
12 Your Honor, with regard to equity. The man
13 has two potential possibilities of adjusting
14 his status in the United States. One
15 pursuant to a labor certification he
16 allegedly has.

17 THE COURT: That's something, again, to
18 be directed to the Immigration Service.
19 Cases have held that clearly, haven't they?

20 MR. BUXBAUM: He's certainly entitled
21 to a justice status.

22 THE COURT: I'm not just supposed to
23 stall so he can do that. I got the matter

1 in front of me with or without that, Mr.
2 Buxbaum.

3 MR. BUXBAUM: Yes, you do.

4 THE COURT: That doesn't help me any.

5 MR. BUXBAUM: Okay.

6 MR. DiBIANCO: I'd like to have some
7 copies of this made and submit this with our
8 papers. Is there any objection to that?

9 MR. BUXBAUM: Just that we're
10 astounded by that decision, if it's a
11 decision. It looks like it. Certainly
12 looks like one. It's an astounding thing.

13 THE COURT: You better get your notice
14 for appeal filed.

15 MR. BUXBAUM: We'll certainly do that.

16 MR. DiBIANCO: The government's
17 position is just basically very simple, a
18 close reading of that transcript will
19 demonstrate that the petitioner was given
20 all his constitutional mandated rights and
21 statutory mandated rights and we don't believe
22 there's any equity.

23 MR. BUXBAUM: Your Honor, I will be

1 perfectly willing to concede that if the
2 attorney for the government would point
3 out where in the transcript he was advised
4 of his right to appeal, where in the
5 transcript--

6 THE COURT: I've seen the transcript
7 and those are omissions, clearly.
8 The other matter is a matter of interpreta-
9 tion. As it's presented here it's merely
10 an issue of fact. I don't know what was
11 said there, of course. I don't think it makes
12 a great deal of difference. I think that
13 in the course of translation that
14 authorize or whatever the other word was
15 probably could be used changeably or
16 interchangeably in any event. That passage
17 doesn't disturb me. I think that was clear.
18 You had an alternative and the Answer
19 indicates a choice, an alternative choice,
20 not a compliance with a command, but the
21 omissions are equally or are more clear
22 rather.

23 Stand in recess until 12:00 o'clock.

1 (Whereupon, the hearing was in
2 recess until 12:10 P.M.)

3 THE CLERK: Court is in session.
4 Please be seated.

5 THE COURT: I have earlier signed
6 an Order to Show Cause in this proceeding
7 based on a petition and affidavit of
8 Michael J. Kopcsak. At that time it was
9 apparent from the affidavit statement that,
10 who was counsel for the petitioner, that he
11 had little information concerning the case.

12 It appeared then that the petitioner
13 was being held by the Immigration Service
14 without, and being held for deportation,
15 without any notice of any kind. The Order to
16 Show Cause was made returnable this morning,
17 required the production of the alien, the
18 petitioner, and it further stayed his
19 removal from the Northern District of New
20 York pending the determination of the writ.

21 Upon the return this morning I have
22 before me the petition, an opposition to the
23 writ, supplementary answer in opposition to

1 the writ and a reply affidavit in support
2 of the petition. Through some kind of a
3 misunderstanding, appaently, an interpreter
4 was not available this morning although the
5 government claims that arrangements had been
6 made for an interpreter to be present and
7 through some mixup or misunderstanding
8 between government counsel and petitioner's
9 counsel the presence of the interpreter
10 was called off. In any event that has
11 become academic because both sides have
12 agreed on the record and the petitioner has
13 agreed as well, I say the petitioner through
14 counsel, I don't know if the petitioner
15 even understands what's going on, even
16 though he's seated here in the courtroom,
17 that the matter should be decided on the
18 papers without any oral evidence.

19
20 On the basis of the papers before me
21 it appears that the petitioner is a seaman
22 who entered the United States for a stay
23 not to exceed 29 days, that thereafter, the
entry was made on or about February 10, 1974,

1 he was allowed to enter the United States
2 as a crewman for a stay no longer than 29
3 days. It appears that he overstayed his
4 leave, that he was charged as a deportable
5 alien and that an order to Show Cause was
6 issued which is attached to the Opposition
7 to a Writ of Habeas Corpus as an exhibit 1.

8 There's some apparent confusion about
9 the date of that Order to Show Cause.

10 The petitioner maintains that there's a
11 legend at the side of the Order to Show Cause
12 which refers to it superceding a Show Cause
13 Order issued July 17, 1974 and that the
14 Show Cause Order itself is dated July 13th.
15 I'm inclined to think that that's either a
16 misreading of the copy supplied to the
17 petitioner or that it's a poor copy because
18 the copy that I have indicates very clearly
19 that it's July 18th.

20 Now, the 8 and the 3 might have been
21 confused, but it's clear and it makes sense.
22 In any event, that would be a minor discrepan-
23 cy. I can appreciate that in this sort of

1 case the big effort that is devoted
2 or is directed, the big effort is directed
3 by the alien to see that all the I's are
4 dotted and that all the T's are crossed and
5 that all the 8's look like 8's and not like
6 3's and that's something about which I don't
7 think I need make any comment, except that I
8 will comment to this extent, that to me the
9 lack of a dot over an I to me is still just
10 the lack of a dot over an I, if it's pretty
11 clear to me that it's an I it's an I and
12 the fact that a T isn't crossed doesn't make
13 it a Z.

14 Now, I've examined the petition and
15 all the answering papers. I'm satisfied that
16 the hearing that was afforded the petitioner
17 substantially complies with the requirements
18 of the regulations except that I see no place
19 in the transcript where the petitioner was
20 advised that he would have a reasonable
21 opportunity to examine and object to the
22 evidence against him, to present evidence
23 on his own behalf and to cross examine

1 witnesses presented by the government.

2 Whether that's an omission of
3 substantial nature or of a nature of a
4 harmless error I don't pass on because I
5 don't think it's necessary to in this
6 proceeding at this time. It appears from
7 the transcript of the hearing, without
8 question, that the interpreter was employed,
9 the transcript makes it appear quite clearly
10 to me that the petitioner understood the

11 proceeding, the responses were directly
12 responsive to the questions that were asked.
13 The question raised as to the right to have
14 a lawyer I regard as inconsequential because
15 taken as a whole that question or direction,
16 statement, clearly tells the petitioner
17 that he can have a lawyer, has a right to have
18 a lawyer without cost to the government,
19 that he has the right to speak for himself,
20 to act as his own representative and that
21 he had the choice and he exercised a choice
22 by saying "I will speak for myself," The
23 questions indicate that the substance of the

1 Order to Show Cause were made known to him,
2 that he admitted the charges that were
3 presented against him, that he exercised
4 the option to depart voluntarily. It was
5 also indicated to him that he could apply
6 for an extension of his departure although
7 no assurance was given him that such
8 extension would be granted necessarily.

9 It appears that he posted a bond in
10 the sum of \$2500.00 for his release and that
11 a decision of the immigration judge was
12 entered at the conclusion of the hearing.
13 Exhibit 4 attached to the Opposition to
14 the Writ of Habeas Corpus is a form I39,
15 Final Order, in which the decision is
16 embraced in writing and in which the
17 respondent's application for Voluntary
18 Departure is granted. It has the further
19 provision and Order that if the respondent
20 fails to appear when and as required the
21 privilege of voluntary departure will be
22 withdrawn without further notice or
23 proceedings and the following Order shall

1 thereupon become immediately effective.
2 Respondent shall be deported from the United
3 States to the Republic of China on Taiwan
4 on the charges contained in the Order to
5 Show Cause. The date for his voluntary
6 departure was October 4, 1974 and according
7 the document presumption of regularity to
8 which it's entitled, I find that it was
9 served on the respondent.

10 The present proceeding arises out of
11 the failure of the petitioner to voluntarily
12 deport himself or to appear as required
13 by the Order and the subsequent Order of
14 Deportation. It appears from Exhibit 5
15 attached to the Opposition to Writ of
16 Habeas Corpus that a warrant of deportation
17 was issued, that the petitioner and his
18 surety were notified of the time and place
19 to which the petitioner was obliged to
20 report for deportation.

21 It's clear that he failed to report,
22 that he was subsequently taken into custody
23 in Albany, New York, where he was at first

1 going to be charged with being an alien
2 illegally in the country and, apparently,
3 that Order to Show Cause was withdrawn when
4 it was discovered that there was an
5 outstanding warrant of deportation against
6 him.

7 It was at that juncture that the
8 application was made to this court, although,
9 as I said earlier, it was made without full
10 knowledge of all the existing facts.
11 It also appears that the petitioner has
12 applied to the Immigration Service to reopen
13 the deportation proceedings. There is a
14 dispute as to what has occurred with
15 reference to that petition to reopen. The
16 statement contained in the papers of the
17 petitioner indicate that the Show Cause
18 Order was made, on the petition to reopen,
19 was made returnable tomorrow, I believe, in
20 Albany; is that correct?

21 MR. BUXBAUM: Yes.

22 THE COURT: This morning as part of
23 these proceedings the government attorney

1 has filed with the Clerk of the Court an
2 Order of an Immigration Judge dated June
3 27th denying the motion to reopen the
4 proceedings. Apparently counsel for
5 petitioner hasn't been notified of that
6 Order if it's been entered, although in the
7 Order it appears he appears as counsel for
8 the petitioner in this proceeding referred
9 to as, I guess he's referred to as the
10 respondent in that proceeding.

11 I think the case resolves itself very simply.
12 I haven't dealt with all the extraneous
13 material that has been supplied because I
14 regard it as just that, extraneous. This
15 appears to be clearly a case within the
16 Congressional scheme or pervue that the
17 administrative remedy should be availed of
18 and exhausted before any application is
19 made such as the one being made here.

20 The fact that the petitioner has a
21 remedy is demonstrated most clearly I think
22 by the fact that he has taken it. He's
23 petitioned for a reopening. The very grounds

1 that he seeks to reopen are the same grounds
2 that he seeks relief from this court.
3 I think it would be an unwarranted and
4 unjustified interference with the procedures
5 set up by the Congress for me to interfere
6 at this juncture. The statute makes it
7 clear, Title 8 Section 1105A (c) that a
8 deportation order should not be reviewed by
9 any court until all of the administrative
10 remedies have been exhausted and then the
11 judicial review lies with the Court of
12 Appeals.

13 I'm always puzzled as to whether the
14 court has jurisdiction or not when there's
15 this failure to exhaust, but in any event I
16 think it mandates a dismissal of the Writ.

17 I think that the Supreme Court has
18 clearly held that the review of a denial
19 of an Order to Reopen a deportation
20 proceeding lies in the Court of Appeals.

21 I'm sure counsel is familiar with the
22 case. It appears to be a leading case,
23 Chang Fang Quak (Phonetic) the Immigration

1 Service 392 U.S. 206, 1968, and it has
2 considerable company in the reported cases.

3 I've examined the cases cited by
4 counsel and I don't find them decisive with
5 the issues we have here. Those are cases
6 that went to Court of Appeals to review
7 determinations of the Immigration Board of
8 Appeals, so that they never had occasion to
9 get into the exhaustion question. Even on
10 the merits the best that can be said for
11 them, for the two cases, let's see, one of
12 them was a 2nd Circuit Case Ballenilla-
13 Gonzalez v Immigration and Naturalization
14 Service 546 of 2nd 515, 2nd Circuit, 1976,
15 and the other is a 7th Circuit case which
16 fortuitously happened to be written by a
17 Southern District Judge, Judge Van Pel Bryant,
18 but it's entitled Castaneda-Delgado v
19 Immigration and Naturalization Service
20 525 of 1295 7th Cir. 1975. I think that
21 all that can be said of those cases is that
22 the one instance in the 7th Circuit the
23 failure to reopen a deportation proceeding

1 or Order was arbitrary and capricious
2 under the circumstances and that related to
3 the right to be represented by an attorney
4 of the alien's choice. The denial of that
5 right was a denial of a substantial right
6 and the matter was remanded. So that the
7 error could be cured. The other case leaves
8 open the question of requirement of
9 assigned counsel and neither of them deal
10 with the failures that are charged in the
11 omissions in this hearing.

12 As I have indicated the appropriate place
13 for that to be resolved is through the
14 Immigration Board of Appeals and the Court
15 of Appeals.

16 Accordingly, the application for Writ
17 of Habeas Corpus is denied. I don't want this
18 man hustled down to the airport tonight
19 and I'll see that he isn't.

20 I'll continue the stay granted in my
21 Show Cause Order for a period of ten days
22 so that the petitioner, if he sees fit, may
23 make an application to the appropriate

1 court or body having jurisdiction for
2 further relief.

3 I'll prepare and enter an Order to
4 that effect right after lunch.

5 Yes, Mr. Buxbaum.

6 MR.BUXBAUM: Your Honor, we'd like to
7 make further application pursuant to your
8 Order to have the petitioner released ;
9 on bail in the interim period and the I.N.S.
10 has refused to consider bail application.

11 THE COURT: Well, in view of the back-
12 ground of this case I'll deny your request.
13 Here's a man that according to the records
14 before me attended a deportation hearing,
15 was served with an Order of Deportation,
16

17 requested voluntary departure, was
18 notified--first didn't report pursuant to the
19 voluntary departure agreement, next was
20 notified to report for deportation, did not

21 report according to the records before
22 me, again; told, I won't say a fanciful,
23 but an untrue, gave the Immigration Service
an untrue statement when he was apprehended

1 and had they not checked their records
2 I'm sure that on the issuance of an Order to
3 Show Cause why he shouldn't be deported
4 he would, again, be released on probably a
5 nominal bond or perhaps on his own
6 recognizance and that's all I know about
7 him and those facts--I think that an agency
8 with more knowledge about the petitioner
9 should determine whether or not he should
10 be released on bond.

11 MR. BUXBAUM: The right to reasonable
12 bail is a constitutional right.

13 THE COURT: This is not a criminal
14 case.

15 MR. BUXBAUM: He still has, even more
16 importantly.

17 THE COURT: I would think you may be
18 right and I'm going--that's why I've given
19 you ten days so you can address that
20 argument on appeal from my Order, but I
21 think more appropriately you can address it
22 to the Board of Immigration Appeals.

23 Now, I don't know what it would cost

1 the government to find this fellow if they
2 had to go looking for him again. If they
3 could ever find him. I doubt if they could
4 ever find him. It would only be by an
5 accident and if I were to put the bail
6 sufficiently high to assure his presence I
7 think it would be tantamount to denial of
8 bail. I'll let someone that knows more
9 about the matter than I do take care of
10 that.

11 You've got a 10 day stay.

12 MR. DiBIANCO: I assume, Your Honor,
13 he does not wish the petitioner moved from
14 the district?

15 THE COURT: I've continued that
16 for ten days. That's ten days from today.

17 THE COURT CLERK: Court stands in
18 recess to chambers.

19

20

21

22

23

File No. A 15 196 8.57

UNITED STATES OF AMERICA:

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

In the Matter of

In Deportation Proceedings Under Section 242
of the Immigration and Nationality Act*Chen, Per Rong*

Respondent.

DECISION OF THE
IMMIGRATION JUDGE

Upon the basis of respondent's admissions I have determined that he is deportable on the charge(s) in the Order to Show Cause.

Respondent has made application solely for voluntary departure in lieu of deportation.

ORDER: It is ordered that in lieu of an order of deportation respondent be granted voluntary departure without expense to the Government on or before

October 4, 1974 (Date)

or any extension beyond such date as may be granted by the district director, and under such conditions as the district director shall direct.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the United States to the Republic of China on Taiwan on the charge(s) contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforementioned country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept respondent into its territory, the respondent shall be deported to Hong Kong

Copy of this decision has been served on respondent.

Appeal: ~~Waived-reserved~~

Date: Sept 4, 1974Place: New York, N.Y.*J. P. [Signature]*
(Immigration Judge)

FINAL ORDER

SEP 4 1974

[Signature]

